(2)

No. 91-2022

Supreme Court, U.S.
FILED
JUL 13 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE WASHINGTON PUBLIC POWER SUPPLY SYSTEM SECURITIES LITIGATION
MDL-551

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Petitioner,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: July 10, 1992

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QUESTION PRESENTED

The question presented is whether the Ninth Circuit erred in its application of the factors set forth in Hilton v. Braunskill, 481 U.S. 770 (1987).

PARTIES TO THE PROCEEDINGS

Public Utility District No. 2 of Grant County, Washington is a municipality of the State of Washington, and has no parent or subsidiary entities.

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This brief is submitted by Public Utility District No. 2 of Grant County, Washington ("the District") in opposition to the application of Illinois Employers Insurance of Wausau ("Wausau") for a writ of certiorari to the Court of Appeals for the Ninth

Circuit. Wausau seeks review of an order dissolving a stay of an order remanding the District's lawsuit to state court. Wausau's basic argument is that the denial of stay presents an important issue of federal jurisdiction, because once remand of the District's case occurs, the federal courts lose jurisdiction over the case.

The issue presented by Wausau is moot. The district court clerk transmitted the file in the District's case back to the Washington state court on June 12, 1992. App. A. Thus any "irreparable injury" which would flow from the remand has already occurred, and, according to Wausau, there is nothing which can be done about it now.

In addition, this matter does not present an issue within this Court's certiorari jurisdiction. The only issue presented--the appropriate standard for

granting or denying a stay--is legally well settled and not subject to any conflict among the courts of appeal. Wausau's real complaint is with the application of that standard to the facts of this case.

ARGUMENT

A. Review is Premature.

Under Supreme Court Rule 11, in the event a petition is filed before judgment is entered below, it will be granted:

> only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.

The denial of a stay in this case does not satisfy the requirements of Supreme Court Rule 11. After all, this is just a simple insurance coverage dispute between two parties. The main issue in

the underlying appeal is the application of the insurance policy's forum selection clause, which has been uniformly interpreted against Wausau's position for at least thirty years. This is not the stuff of "imperative public importance" to which Supreme Court Rule 11 is directed.

B. No Important Issue or Conflict Is Presented.

At root, Wausau's position is that the Ninth Circuit's denial of a stay in this case has effectively precluded review of any remand order in any case where a remand is based on a non-jurisdictional factor. There is no "jurisdictional conundrum" or important issue here. Even accepting Wausau's argument that jurisdiction is lost upon a remand of a removed case, federal courts can preserve jurisdiction in appropriate cases simply by staying the remand order pending appeal.

The real issue presented is whether the Ninth Circuit properly applied the standards of Hilton v. Braunskill, 481 U.S. 770 (1987) to the facts of this case in dissolving the stay. Hilton sets forth a four-part test, which considers the likelihood of appellant's succeeding on the merits, irreparable injury absent granting of a stay, harm to other parties from granting a stay, and the public interest. Wausau argued below that Hilton is governing law and that Hilton requires an individualized determination of whether to grant a stay in each case. When the Hilton analysis comes out against it, Wausau cannot shift position and argue that the standard for stay is an issue of first impression.

The standard for granting a stay pending appeal is well settled under Hilton. Wausau has not shown that the

application of that standard to the facts of this case is an issue of first impression, an important issue, nor one of "imperative public importance." This case is like any other where a court exercises its discretion to deny a stay pending appeal.

C. The Ninth Circuit Did Not Abuse Its Discretion.

The Ninth Circuit did not abuse its discretion in the application of the Hilton factors. The district court and the Ninth Circuit both made specific findings that Wausau did not meet any of the stay criteria. The district court ruled against Wausau on the merits, thus concluding that it would not prevail on the merits. The Ninth Circuit denied the stay, citing cases indicating that Wausau was not likely to prevail on the merits. The district court specifically found that the District would be harmed by the entry of a stay. The only basis

Wausau argues for irreparable harm is that once the case is remanded, it can no longer obtain review of the remand order. The remand has already occurred. Although we do not address the merits of Wausau's position on the jurisdictional issue, we do note that even if it is correct, review of the remand order is possibly available through Supreme Court review of a subsequent judgment in the case. Under Supreme Court Rule 11, this is the preferred course.

D. The Balance of the Equities Does Not Favor Wausau.

Wausau argues that the balance of the equities favors it. It ignores a specific finding by the district court that respondent would be harmed by the granting of a stay. The Ninth Circuit dissolved the stay apparently based on Wausau's low probability of success on the merits. Finally, Wausau has never

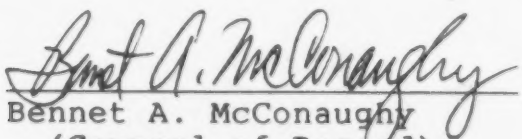
made any showing concerning the public interest. The states have a strong interest in holding insurers to their contracts (including the forum selection clauses they put in contracts). And the federal policies of generally restricting review of remand orders to avoid prolonged jurisdictional disputes (28 U.S.C. § 1447(d)), and of not enjoining state court proceedings (28 U.S.C. § 2283) also support denial of a stay.

CONCLUSION

Wausau's petition for a writ of certiorari is frivolous. The issue presented is moot. Furthermore, the Ninth Circuit simply applied the rule of law requested by Wausau. This does not present an important unresolved question within this Court's certiorari jurisdiction. After Wausau was advised that Justice O'Connor had denied its

application for a stay and the case file had been transmitted back to the state court, the District requested in writing that Wausau withdraw the instant petition. Since the only issue presented by the petition was whether a stay of the remand should have been granted pending the appeal, Wausau's petition was mooted by the remand. Wausau refused this request. Under these circumstances and because Wausau's petition is now frivolous even by its own logic, the District asks for an award of attorneys' fees and double costs against Wausau pursuant to Supreme Court Rule 42.2.

Respectfully Submitted,



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Dated: July 10, 1992

Appendix A

M E M O R A N D U M

Date: June 12, 1992

To: Superior Court of Washington for Grant County

From: M. Gregory, Deputy Clerk, U.S.D.C., Seattle

Subject: Remand of C91-816

Pursuant to Judge Browning's 3/12/92 order remanding C91-816 to your Court, and the 5/29/92 order by the Ninth Circuit Court of Appeals dissolving the stay of remand pending appeal, the enclosed is being sent to you:

1) two (2) volumes of original documents;

2) a certified copy of the docket;

3) a certified copy of Judge Browning's remand order;

4) a copy of this memo: please date stamp and return.

If there are problems or questions, please call.

cc: Judge Browning
CCA
all counsel
ns
file